U.S. Senate
Republican Policy
Committee

Legislative Notice

Jon Kyl, Chairman

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

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S.J. Res. 1 — The Marriage Protection Amendment

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Majority Leader Frist moved to proceed to S.J. Res. 1, the Marriage Protection Amendment, on May 26, 2006. The proposed constitutional amendment was reported favorably by the Judiciary Committee on May 18, 2006, without a written report.

Noteworthy

- The business currently before the Senate is a motion to proceed to the consideration of S.J. Res. 1, the Marriage Protection Amendment (MPA). At press time, there was no time agreement for the consideration of this amendment to the U.S. Constitution. It is expected that Senator Frist will file cloture on the motion to proceed.
- S.J. Res. 1 was introduced January 24, 2005, with 31 cosponsors. It is identical to the constitutional amendment that the Senate attempted to consider in July 2004 (S.J. Res. 40). Cloture on the motion to proceed to the amendment failed, 48-50.
- The amendment provides a common, unifying definition of marriage throughout the United States and prevents *courts* from requiring that marital rights and benefits be given to unmarried couples.
- Since the July 2004 cloture vote, state courts in Washington, New York, California, Maryland, and Oregon have found traditional marriage laws unconstitutional, and a federal judge in Nebraska has struck down a state constitutional amendment.
- Proponents of this constitutional amendment, including President Bush, contend that it is the only legislative option available to prevent activist lawyers and judges from imposing same-sex marriage on all the states. That is, failure to enact a constitutional amendment will result in national, court-imposed same-sex marriage — despite the wishes of most Americans.

Summary of S.J. Res. 1

S.J. Res. 1 proposes an amendment to the U.S. Constitution that would read as follows:

> Marriage in the United States shall consist only of the union of a man and a woman.
>
> Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

The First Sentence

The first sentence provides a common definition of marriage throughout the United States — one man and one woman. Individual states would not be able to override this shared definition. Inconsistent definitions state-to-state on the core characteristic of marriage would be unworkable legally and culturally.

The Second Sentence

The second sentence of the amendment guards against judges who would construe state or federal constitutions in such a way as to require the creation of "civil unions" or "domestic partnerships" — "marriages" in all but name only — despite the fact that the voters or elected legislators never created those institutions.

S.J. Res. 1 *does not* prohibit the citizens of a state from acting through a legislative process to grant whatever benefits or statuses they want for same-sex couples in that state (including same-sex civil unions or domestic partnerships). Nor does it prevent employers from granting whatever benefits they want to same-sex couples. What it prevents is *judicially imposed* allocation of marital rights or benefits to same-sex couples.

Background

This proposal to amend the U.S. Constitution is a defensive response to an ongoing campaign in the nation's courts to rewrite the nation's marriage laws. Marriage Protection Amendment ("MPA") proponents believe that state marriage laws will continue to suffer the fate that Massachusetts's marital institution did when that state's high court ruled that traditional marriage laws were unconstitutional. Moreover, proponents believe that the growing number and intensity of lawsuits throughout the nation challenging the federal Defense of Marriage Act ("DOMA"), state marriage laws, and even state constitutional amendments demonstrates that only a constitutional amendment will protect marriage as between a man and a woman.

The Activists' Campaign: From Vermont to Massachusetts

The same-sex marriage activists' campaign began in Alaska and Hawaii in the early 1990s, but found its first major victory in Vermont in 1999. In response to a suit by the ACLU and the other activist groups, the Vermont state supreme court ordered the legislature to recognize same-sex marriage or to create some form of "civil union" that was exactly like marriage. The legislators chose civil unions, but only in light of the state supreme court's dictate.

These same activist groups next turned their efforts to a lawsuit in Massachusetts, where they calculated that the state supreme court would be amenable to redefining marriage. Their calculation was successful. A 4-3 majority of the Supreme Judicial Court of Massachusetts ruled in November of 2003 in *Goodridge v. Massachusetts Dep't of Health*, 798 N.E. 2d 941 (Mass. 2003), that the state's refusal to issue marriage licenses to same-sex couples violated the state constitution. The court concluded that to insist on traditional marriage was to engage in "invidious" discrimination that the court would not tolerate. Further, the court wrote that there was "no rational reason" to preserve traditional marriage laws, that support for traditional marriage was rooted in little more than "persistent prejudices," and that the several-thousand-year-old institution of marriage was little more than an "evolving paradigm" that could be recrafted and rewritten by courts whenever they so desired. In a follow-up opinion reaffirming and expanding the earlier decision a few months later, the same four judges even said that the marriage laws of Massachusetts were a "stain" on the constitution and that the "stain" must be "eradicated" by the court. The court went so far as to suggest that it would be better to abolish civil marriage altogether rather than preserve it in its traditional form. *See Opinions of the Justices to the Senate*, SJC 09163 (Feb. 3, 2004).

On May 17, 2004, the Goodridge decision took effect, and the state began issuing same-sex marriage licenses in Massachusetts. Many same-sex couples from other states traveled to Massachusetts and returned to their own states. Efforts are currently underway in Massachusetts to return marriage to its traditional meaning through amending the state constitution, however the legislature has postponed consideration of the measure until after the state's high court decides whether its own 2003 judicial mandate can be overridden by state constitutional amendment through a ballot initiative. In the meantime, same-sex marriage is a reality.

The Campaign Continues

The activists' Massachusetts victory proved a stepping-off point for further lawsuits. There are currently nine states facing lawsuits challenging traditional marriage laws — California, Connecticut, Iowa, Maryland, Nebraska, New Jersey, New York, Oklahoma, and Washington. In four of these states — California, Maryland, New York, and Washington — state trial courts have already struck down marriage laws and found a right to same-sex marriage in state constitutional provisions dealing with equal protection and due process. These decisions were stayed pending appeal. In Nebraska, a federal district court in 2005 found unconstitutional a state constitutional amendment passed by 70 percent of Nebraska voters; the case is on appeal.

Many more lawsuits will surely follow. Consider the following examples:

First, as noted above, the activists will continue to file more lawsuits challenging state marriage laws, the same way they did in Massachusetts and are doing in nine other states today.

Second, there will be more lawsuits seeking to strike down the Defense of Marriage Act so that same-sex couples can get access to federal benefits such as tax-filing status, Social Security benefits from same-sex partners, and many of the other benefits or rights that the federal government grants to married spouses. Already, for example, there are lawsuits pending in Oklahoma and Washington that directly claim that DOMA is unconstitutional. (The U.S. Court of Appeals for the 9th Circuit recently dismissed such a case on technical, standing grounds.)

Third, these activists will file lawsuits trying to force other states to recognize the same-sex marriages in Massachusetts and any other place where they can convince judges to change the marriage laws against the people's will.

Finally, there will be many other lawsuits that cannot be anticipated but that will happen as same-sex "married" couples move from state to state, as so many Americans do nowadays. These couples will try to get divorced when marriages fail; they will try to execute and enforce wills; they will have run-of-the-mill business disputes. Courts will struggle to figure out how to treat their legal relationships when these disputes arise, and those struggles will take on a constitutional dimension.

Cases such as these will proliferate, some filed by activists and some filed by citizens just trying to live their lives. The result will be tremendous confusion in the courts throughout the nation, as some states recognize same-sex marriage for some purposes while other states recognize them only for other purposes. But as these lawsuits progress, it will be the courts — not the people — who make the decisions on whether same-sex marriage will spread to the entire nation.

Ultimately, the Supreme Court Will Be Asked to Rule

In the not-too-distant future, the legal activists who are managing this challenge to traditional marriage laws will decide that they are ready for the "big case" — the case before the U.S. Supreme Court. They will tell the Supreme Court that the confusion in the states demands a national solution. They will argue that we are one nation, and that we cannot long function with such fundamentally inconsistent understandings of marriage. And when that day comes — when the U.S. Supreme Court is presented with the opportunity to rule traditional marriage laws unconstitutional — it is very possible the Court will side not with the oft-surveyed views of the American people, but, rather, will find a constitutional reason to say the people have been wrong, and that marriage's essence must be changed.

Administration Position

The Administration has not yet released a Statement of Administration Policy (SAP) on S.J. Res. 1. However, the Administration has previously announced support for the measure. Prior to the measure's consideration during the 108th Congress, the Administration released a SAP strongly supporting adoption of S.J. Res. 40. The SAP read, as follows:

> The Administration strongly supports passage of S.J. Res. 40. Marriage has been the foundation of our society and of societies and cultures throughout history — and it has always been defined as the union between a man and a woman. Yet today a few activist judges and local officials have made an aggressive effort to redefine the fundamental meaning of marriage. Without a constitutional amendment, these judges and local officials can continue to attempt to force States to accept same-sex marriages against the wishes of their own citizens. Such judges could even strike down the Defense of Marriage Act, which was passed by an overwhelming bipartisan margin, and declare that all marriages recognized in one State must be recognized as marriages everywhere else. When some judges insist on redefining the fundamental institution of marriage for their states or the entire country, the only alternative left for the people's voice to be heard is an amendment to the Constitution – the only law a court cannot overturn. The future of marriage in America should be decided through the democratic process, rather than by the court orders of a few. The Administration urges members of the House and Senate to promptly pass, and to send to the States for ratification, an amendment to protect marriage.

Other Views

The primary objections to the MPA are as follows:

Not Necessary Because Better Handled State-to-State — The most common argument against the MPA is that each state should be able to have its own position on same-sex marriage, that there is no harm in Massachusetts having one rule while other states disagree. *In theory*, this may be correct, although many MPA proponents believe that same-sex marriage anywhere in the United States undermines traditional marriage itself and may lead to a decline in the traditional family structure. Equally importantly, MPA proponents assert that this argument completely ignores the reality of the same-sex marriage advocates' campaign through the courts. That campaign is designed to impose same-sex marriage on *all* the nation, regardless of whether the state is amenable. (In Massachusetts, for example, the electorate had no voice in this policy decision.) Advocates are candid about their intention to build their case in the courts on a state-by-state basis, and then to bring a carefully staged case to the Supreme Court when they deem the timing best. Thus, there can be no state-by-state solution, because the end result of doing nothing is court-imposed same-sex marriage nationwide.

Not Necessary Because Marriage Laws Will Not be Struck Down — Some argue that the MPA is not necessary because courts will not strike down traditional marriage laws. This argument brushes over the Massachusetts court's edict, and ignores the many lawsuits pending throughout the nation. Moreover, this argument appears to be grounded in unfamiliarity with the litigation strategy of same-sex marriage advocates, candidly stated by leaders of Lambda Legal, the ACLU, Freedom to Marry, and other groups.

Premature Because Only Massachusetts Affected — Some argue that the amendment is premature because same-sex marriage has been imposed on only one unwilling electorate, that of Massachusetts. First, as a factual matter, the supreme court of Vermont imposed same-sex "civil unions" on that state in 1999. Second, this argument neglects the campaign through the courts mounted by the same-sex marriage activists. Third, it would be grossly unfair to all Americans to wait until all traditional marriage laws have been struck down before the people were given the opportunity to speak through the constitutional amendment process.

Premature Because DOMA Not Struck Down — Some argue that the Defense of Marriage Act, passed overwhelmingly in 1996, is sufficient to block the spread of same-sex marriage. First, DOMA does not stop one state court from overriding the wishes of the citizens of that state and recognizing an out-of-state same-sex marriage. Second, DOMA does not prevent state *or federal* courts from redefining marriage. In short, federal DOMA does not trump the U.S. Constitution. That law is already being challenged in Oklahoma and Washington federal courts, in each case on the basis that the U.S. Constitution's equal protection and due process clauses mandate a ruling that DOMA is unconstitutional.

Not Necessary Because Same-Sex Marriage is Good Social Policy — At least one Senator has praised the Massachusetts court decision. Others have said that the MPA should be opposed because same-sex marriage is good social policy. MPA proponents obviously disagree, but also argue that if Senators genuinely believe that same-sex marriage is good social policy, they should be willing to say so. MPA proponents also respond that same-sex marriage should not be imposed by the courts in any case, because it is antithetical to a democratic republic to allow fundamental questions of social policy to be decided outside of the legislative process. If the people want same-sex marriage, they argue, they should refuse to ratify the MPA when it is presented to their state representatives.

Why take up the Marriage Protection Amendment now? — Since the failure of cloture on the motion to proceed to the measure in 2004, state courts in Washington, New York, California, Maryland, and Oregon have found traditional marriage laws unconstitutional, and a federal judge in Nebraska has struck down a state constitutional amendment. The same-sex marriage advocates' campaign through the courts continues. Yet in poll after poll it remains clear that the majority of Americans remain opposed to the redefinition of traditional marriage. The only way to ensure that the American people, rather than judges, decide this fundamental question about the future of marriage in America is to offer them the opportunity to consider and ratify a constitutional amendment through their state legislatures. Approving this measure and sending it to voters made sense in 2004, and it makes even more sense today.